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IN THE
Supreme Court of the United States

October Term, 1949

No. ~~873~~ 127

GEORGE T. GOGGIN, as Trustee of the Estate of A. Moody
& Co., Inc., Bankrupt,

Appellant,

vs.

H. L. BYRAM, Tax Collector for the County of Los An-
geles, State of California,

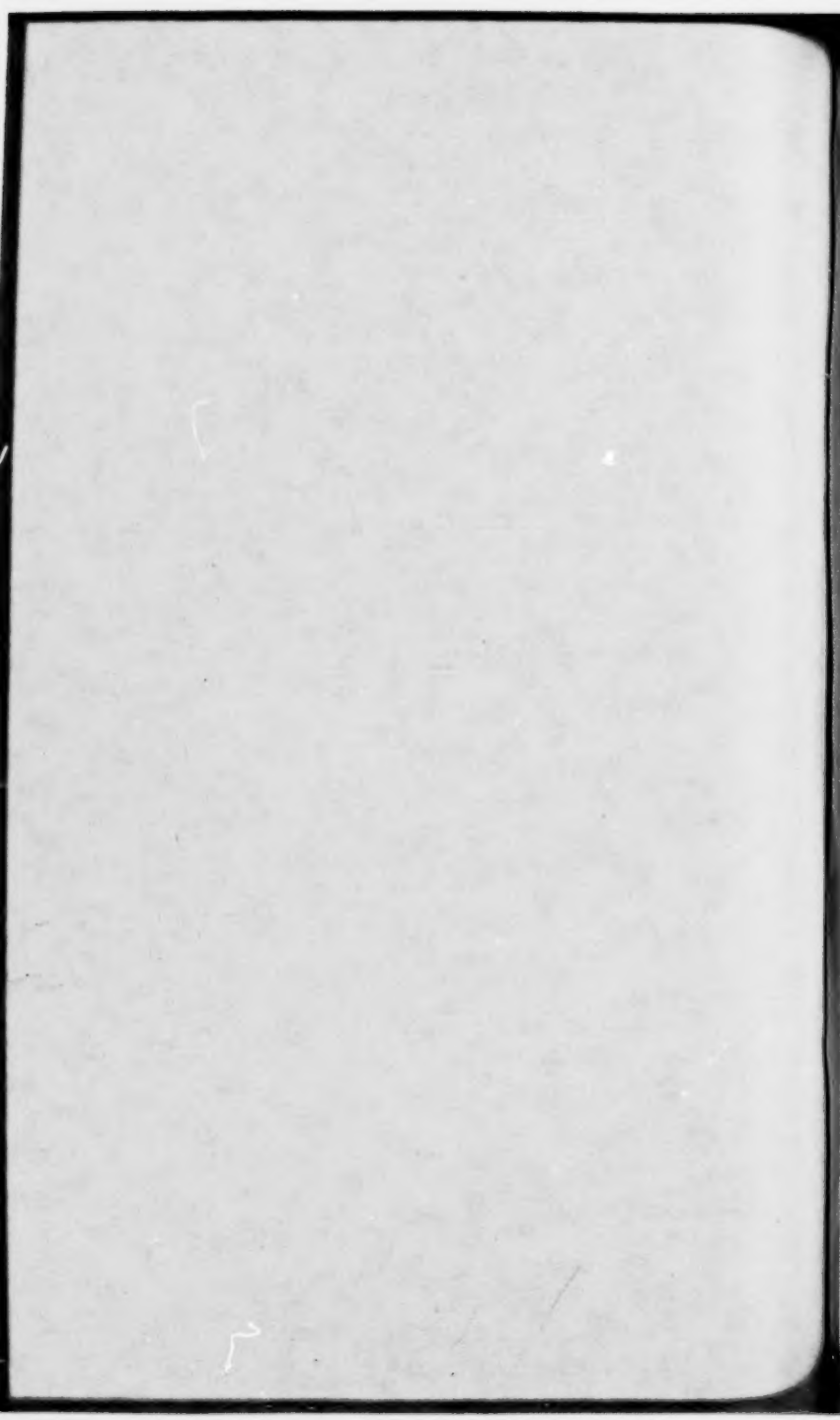
Appellee.

Petition for Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit, and Brief
in Support Thereof.

✓ THOMAS S. TOBIN,

111 West Seventh St. Building, Los Angeles 13,
Counsel for Petitioner George T. Goggin.

FRANK C. WELLER and
RUSSELL B. SEYMOUR,
Of Counsel.



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IN THE
Supreme Court of the United States

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No.

GEORGE T. GOGGIN, as Trustee of the Estate of A. Moody
& Co., Inc., Bankrupt,

Appellant,

vs.

H. L. BYRAM, Tax Collector for the County of Los An-
geles, State of California,

Appellee.

Petition for Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit.

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Your petitioner, George T. Goggin (hereinafter referred to as trustee), as trustee of the estate of A. Moody & Co., Inc., bankrupt, prays that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Ninth Circuit, said judgment determining that the appellee was entitled to the allowance as an expense of administration of a tax claim based upon an assessment made after the date of bankruptcy on pledged personal property which never came into the possession of the bankrupt estate, in which property no equity

existed at the date of bankruptcy or thereafter, and which property after the tax date was abandoned by the trustee pursuant to order of Court, the trustee having realized from other personal property an amount greater than the total tax assessed on both the pledged and other personal property.

In effect the Court below erroneously held that in spite of the provisions of the *first proviso* of Section 64a(4), in spite of Section 62, each of the Bankruptcy Act, and in spite of the order of abandonment, nevertheless pledged personal property, never utilized by the bankrupt estate and from which nothing was obtained by the bankrupt estate and in which no equity existed, should be deemed a part of the estate for tax purposes.

Opinions Below.

The opinion of the Court of Appeals is not yet reported, so far as we are advised; and for the convenience of this Court the aforesaid opinion is set forth verbatim in Appendix "A," pages 15-18.

The opinion of the District Court is included in its judgment, and that also is set forth verbatim in Appendix "B," pages 19-21.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was filed February 21, 1949 and petition for rehearing was filed March 22, 1949, and denied March 23, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254; and under Section 24(c) of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 553, as amended by the Act of June 22, 1938, c. 575, Sec. 1, 52 Stat. 854; 11 U. S. C. A., Supp., Sec. 47(c).

Questions Presented.

1. Does the bankruptcy court have the power or right to disallow as an expense of administration personal property taxes assessed after bankruptcy by a county assessor on pledged personal property which never came into possession of the bankrupt estate and in which no equity existed at the date of bankruptcy or thereafter, and which pledged property was after the tax date abandoned by order of the bankruptcy court, where in the course of administration other personal property, included in the same assessment was sold for an amount greater than the total assessed taxes?

2. Does an order of abandonment made after the tax date eliminate any tax liability arising after bankruptcy on personal property which was never utilized by the bankrupt estate and which never came into its possession and in which existed no interest of value to the bankrupt estate?

3. May the bankruptcy court, under *Gardner v. New Jersey*, 329 U. S. 565, reduce a tax, otherwise legally due and owing, by disallowing a portion thereof assessed after bankruptcy on valueless property thereafter abandoned by the bankruptcy court, where no application is made for relief before a county board of equalization?

Statutes Involved.

1. Section 62a of the Bankruptcy Act, as amended, U. S. C., Title 11, Chap. 7, Section 102, reading as follows:

“The actual and necessary costs and expenses incurred by officers in the administration of estates shall except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estate in which they were incurred.”

2. Section 64a of the Bankruptcy Act as amended, U. S. C., Title 11, Chap. 7, Section 104, reading as follows:

“The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; . . . the costs and expenses of administration . . .; (4) taxes legally due and owing by the bankrupt to the United States or any State or any sub-division thereof: *Provided*, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further*, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court;”

Statement.

The facts in the case at bar are not in dispute.

The appellee accepted as the statement of facts the Statement of the Case in Appellant's Opening Brief and accordingly the appellant will quote therefrom. [Tr. references are to Record before the Court of Appeals.]

“(Note: In lieu of a reporter's transcript of the evidence, respective counsel agreed that the Statement of Evidence [Tr. p. 44], as set out in the Referee's Certificate on Review [Tr. p. 43], would suffice and reference to evidence will be made accordingly. No additional evidence was presented to the District Court.)

A Moody & Co., Inc., the bankrupt herein, filed a petition for an arrangement under Section 322 of the Bankruptcy Act, on January 27, 1947, and on the same day an order was made herein 'placing the debtor in possession' and permitting it to operate its business which was the manufacture and sale of mattresses, and in which business it had been engaged for several months prior to the date of bankruptcy, at 5300 South San Pedro Street, Los Angeles, California. At the date of bankruptcy, at the same address, a portion of the premises were under lease to Haslett Warehouse Company into whose exclusive custody and possession a large quantity of personal property of the bankrupt had already been placed by the bankrupt, and against which personal property warehouse receipts had been issued by Haslett Warehouse Company in conformity to the provisions of the Warehouse Receipts Act of the State of California. Prior to the date of bankruptcy said warehouse receipts had been pledged by the bankrupt to secure an indebtedness owing by it in the sum of about \$117,716.06 as of the date of bank-

ruptcy and as of the tax date herein involved, to-wit, the first Monday in March, 1947, at 12 M., being March 3, 1947. The bankrupt had other personal property in its factory at the date of bankruptcy and on the tax date, some of which was similar to the warehoused goods. The assessor assessed all personal property whether in the warehouse or in the factory, in one amount, to-wit: \$126,950.00, the tax based thereon being \$9,979.86. If the pledged property had been assessed separately the assessed value thereof would have been \$88,118.00, and the tax based thereon would have been \$5,454.50. The order permitting the debtor to remain in possession was vacated March 13, 1947, at which time George T. Goggin was appointed receiver with authority to operate the business. On March 18, 1947, an order of adjudication was made and said George T. Goggin became trustee in bankruptcy with authority to operate the business, as of March 20, 1947. On April 12, 1947, substantially all of the personal property of the estate (excepting the pledged property) was sold for about \$27,000.00. On June 20, 1947, the trustee filed his petition for authority to abandon said pledged property, which authority was thereafter granted,¹ after due notice to all parties. At no time on or after the date of bankruptcy was there any interest or asset of value for the bankrupt estate in the pledged goods, and neither the debtor, nor the receiver, nor the trustee ever took any part of the pledged goods into his possession (excepting that after the tax date there was released to the trustee \$992.82 at assessed valuation of such goods upon payment by the trustee to the pledgee of the warehouse receipts, of the reasonable value of

¹The order was dated August 20, 1947 [Tr. p. 27].

the goods so released), and nothing was ever realized by the estate from said pledged property. On April 4, 1947, Ralph Owen, chief accountant for the bankrupt, made, verified, and filed with the assessor on behalf of the trustee, the statement required by Section 8 of Article XIII of the Constitution of California and by Section 441 of the Revenue & Taxation Code of California, showing as one item thereof 'mdse. at 5300 South San Pedro St. value \$126,950. Cotton-Ticking-Mattresses, etc.' but the said statement was made without the sanction, approval, or direction of the referee in bankruptcy [Tr. pp. 44, 45, 46].

Thereafter on May 31, 1947, the appellee filed his claim for \$9,979.86 in which he petitioned the Bankruptcy Court for its order directing the payment of said sum as a 'preferred claim' [Tr. p. 26.] After a hearing of objections filed by the trustee,² the referee made his order reducing the claim to the sum of \$4,589.96 [Tr. p. 30]. The objections were tried on the theory that the first proviso of Section 64a(4) of the Bankruptcy Act applied to the property in the warehouse and the referee found that a portion thereof was based upon an assessment of \$126,950.00, of which \$88,118 of that amount represented materials which never came into the possession of the trustee of the bankrupt estate, the same at all times being in the exclusive control of Haslett Warehouse Company upon premises leased by it and against which property there were issued, outstanding warehouse receipts and there was not at bankruptcy or at any later time any interest or asset of value in the property in the possession of the Haslett Warehouse Company and the trustee was not permitted to take over, or to assume,

²The objections were filed on August 26, 1947 [Tr. p. 29].

the same as an asset, excepting only that \$992.82 thereof, at assessed valuation, was released to the trustee after the tax date upon payment by him to the pledgee of the warehouse receipts of the reasonable value of such goods so released and subsequently in the administration of the bankrupt estate, the trustee was directed by proper order of this court to abandon, and did abandon the balance of the warehoused property [Tr. p. 31].

The referee further found on April 4, 1947, Ralph Owen, chief accountant for the bankrupt herein, made, verified, and filed with the Assessor on behalf of the trustee of said bankrupt, the statement required by Section 8 of Article XIII of the Constitution of California and by Section 441 of the Revenue & Taxation Code of California, showing as one item thereof 'mdse. at 5300 S. San Pedro St. value \$126,950.00. Cotton-Ticking-Mattresses-etc.' but said statement was made without the sanction, approval, or direction of the referee in bankruptcy [Tr. p. 32].

The referee further found that the trustee prior to the hearing of these objections and pursuant to the order of the court sold all, or substantially all, of the remaining property included in said assessment for an amount greater than the amount of the total claim filed herein by said Tax Collector [Tr. p. 32].

The District Court, without any further evidence than has been adverted to above, set aside the order of the referee, making findings (a) and (b) of his order [Tr. p. 49] to the effect that the appellee had assessed a tax in the amount of \$9,979.86 on all of the personal property of the bankrupt estate situated in Los Angeles County on the tax date, including certain personalty stored by the bankrupt with Haslett Warehouse Company at Los Angeles, prior to the

petition in bankruptcy [Tr. p. 49], and that the assessment was in all respects accurate and made in accordance with the laws of the State of California [Tr. p. 50]. No other findings of fact were made by the District Court.

The District Court concluded that the referee's order of abandonment dated August 20, 1947—which directed the trustee in bankruptcy 'not to take over' the aforementioned property stored in the Haslett Warehouse—did not affect the liability of the bankrupt estate under Sections 62a(1) and 64a(1) of the Bankruptcy Act (11 U. S. C., Sections 102a(1) and 104a(1) for taxes legally assessed and accruing after bankruptcy (*cf.*: *In re Humeston*, 83 F. 2d 197 (C. C. A. 2d, 1936) *Robinson v. Dickey*, 36 F. 2d 147 (C. C. A. 3rd, 1929), cert. den. 281 U. S. 750 (1930)) [Tr. p. 50].

The District Court further concluded that the bankruptcy court, in approving a claim for taxes as an expense of administration, may review a tax assessment (see *Arkansas Corp. Comm. v. Thompson*, 313 U. S. 132 (1940) and *Gardner v. New Jersey*, 329 U. S. 565 (1947)); but may not, under Sections 62a(1) and 64a(1) of the Bankruptcy Act (11 U. S. C., Sec. 102a(1) and 104a(1) reduce or disallow a claim for taxes legally assessed under the laws of the taxing sovereign, irrespective of whether or not the assessment has been approved by judicial decree or by act of a quasi-judicial officer of tribunal (*cf.*: *Lyford v. City of New York*, 137 F. 2d 782 (C. C. A. 2d, 1943)) [Tr. p. 50].

The District Court then made its order that the appellee was entitled to full payment of the \$9,979.86 claim against the bankrupt estate for personal property taxes as an expense of administration (Bank-

ruptcy Act, Sections 62a and 64a(1); 11 U. S. C., Sec. 102a(1) and 104a(1); 3 Collier on Bankruptcy, pp. 1509-1519, 2077-2082) [Tr. p. 51].”

From the order of the District Court the appellant duly filed a notice of appeal [Tr. p. 52] and the matter was presented to the United States Court of Appeals for the Ninth Circuit and was finally determined on February 21, 1949, by an opinion filed on that date, which affirmed the order of the District Court. [Tr. pp. 60, 64.] A petition for rehearing duly filed was denied by the same court on March 23, 1949. [Tr. p. 65.]

The petitioner now seeks review by certiorari.

Reasons for Granting the Writ.

1. This cause involves questions of far-reaching importance in the practical administration of bankruptcy problems, throughout the nation, necessitating an authoritative determination by this Court, in that:

(a) The decision of the Ninth Circuit, if permitted to stand, performs a complete emasculation of the *first proviso* of Section 64a(1) and renders impotent the intention of Congress that a bankrupt estate should not pay taxes on *any* property in excess of the value of the interest of the bankrupt estate, and will thereby substantially reduce the dividends payable to general creditors.

(b) The decision, if permitted to stand, will enlarge an already lengthy list of administrative expenses, without any authority in the Bankruptcy Act.

(c) The decision, if permitted to stand, will render nugatory the abandonment of worthless property by a bankrupt estate unless such abandonment shall be completely effectuated prior to the tax date and will thereby result in an unwarranted decrease of dividends for general creditors.

2. The decision of the Court of Appcals conflicts with the Bankruptcy Act which provides in the *first proviso* of Section 64a

“That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court.”

3. The decision of the Court of Appeals conflicts with the decision of the Court of Appeals for the Third Circuit in *Northumberland County, et al. v. Philadelphia & Reading Co. & Iron Co.*, 131 F. 2d 562; and the decision of the Court of Appeals for the Eighth Circuit in *Hennepin County v. Savage*, 83 F. 2d 453, in refusing to recognize that taxes on property abandoned by the estate are an expense of administration only “when the trustee of debtor actually utilizes in the operation of the business the land upon which the taxes are assessed.”

4. The decision of the Court of Appeals conflicts with the decision of this Court, *Erie Railroad Co. v. Tompkins* (304 U. S. 64), by refusing to follow the decision of a higher court of the State of California. *Helvey v. United States Building and Loan Association*, 81 Cal. App. 2d 647, which held that “when assets have been abandoned

by a trustee or a receiver, the property, insofar as the abandoner is concerned, is left as though he never owned or claimed it and the 'title stands as if no such assignment had been made.' "

5. The Court of Appeals erroneously refused to follow and misinterpreted the effect of the decisions of this Court in *Arkansas Corporation Commission v. Thompson*, 312 U. S. 132 and *Gardner v. New Jersey*, 329 U. S. 565, in refusing to permit the Bankruptcy Court to give effect to the *first proviso* of Section 64a of the Bankruptcy Act.

Your petitioner hereto appends his brief in support of his petition.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted to review the judgment of the Court of Appeals for the Ninth Circuit.

Dated: June 13, 1949.

GEORGE T. GOGGIN, as Trustee,
Petitioner,

THOMAS S. TOBIN,
Counsel for Petitioner.

RUSSELL B. SEYMOUR and
FRANK C. WELLER,
Of Counsel.

United States of America,
Southern District of California,
Central Division,

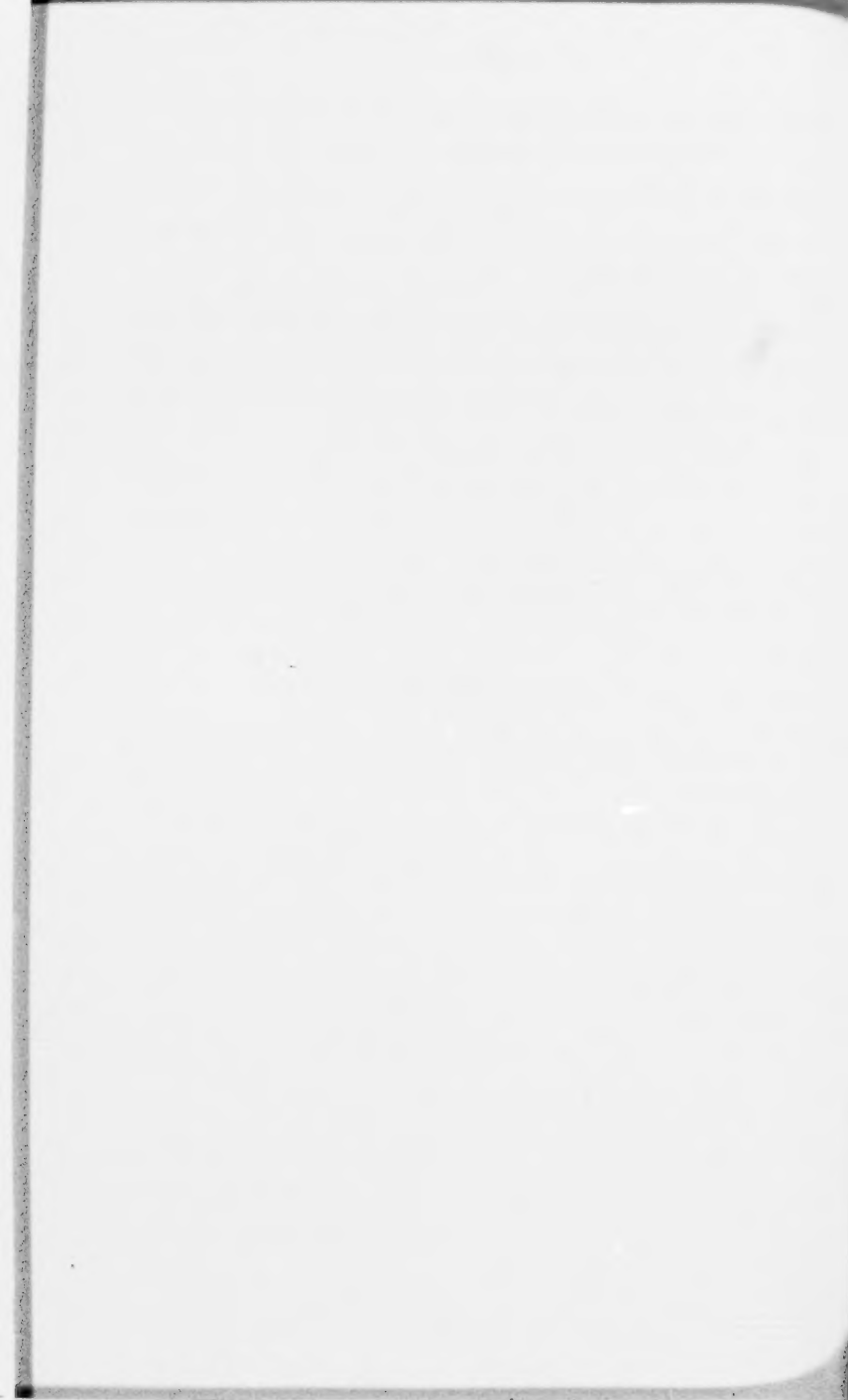
County of Los Angeles,
State of California.

George T. Goggin, being duly sworn, deposes and says:
That he is the appellant in the foregoing entitled matter;
that he has read the Petition for Writ of Certiorari to
the United States Court of Appeals for the Ninth Cir-
cuit and knows the contents thereof; that the same is
true of his own knowledge, except as to the matters
which are therein stated upon his information or belief,
and as to those matters, that he believes them to be
true.

GEORGE T. GOGGIN.

Subscribed and sworn to before me this 13th day of
June, 1949.

IRENE GARCIA,
*Notary Public in and for the County of Los Angeles,
State of California.*



APPENDIX "A"

In the United States Court of Appeals for the Ninth Circuit.

[Title of Cause.]

Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Before Mathews, Healy, and Bone,
Circuit Judges.

Healy, Circuit Judge:

OPINION

On January 27, 1947, A. Moody & Co., Inc., petitioned for an arrangement under §322 of the Bankruptcy Act, and an order was made continuing the debtor in possession with permission to operate its business. On March 14, 1947, appellant Goggin was appointed receiver with like powers. Seven days later there was an adjudication of bankruptcy and Goggin became trustee with authority to operate the business.

The bankrupt was a manufacturer of mattresses. A part of its factory premises was under lease to a field warehouse company, and a substantial portion of its stock, namely mattresses and material for the manufacture thereof, had been placed in the possession of the field warehouseman. Warehouse receipts against this property had been issued prior to the initiation of the proceeding, and the receipts had been pledged by the bankrupt to secure an indebtedness owing by it. The balance of the bankrupt's goods, of like character with those in the field warehouse, was unpledged, and the free mer-

chandise was sold by the trustee on April 12, 1947, for about \$27,000. On April 4, 1947, the trustee filed a verified statement with the assessor of Los Angeles County showing the property owned, possessed or controlled by the bankrupt as of the first Monday in March, 1947. In this statement the entire quantity of merchandise owned by the bankrupt, both pledged and unpledged, was listed as one item valued at \$126,950. The county assessor made a single assessment of the property at the value placed on it by the trustee.

On May 31, 1947, appellee (the county tax collector) filed his claim for \$9,979.86, as the amount of the tax upon the property, and petitioned for an order directing its payment. The referee, on the trustee's objection, ordered the claim reduced by the amount of \$5,389.90 on the theory, apparently that the first proviso of §64a(4) of the Act,¹ presently to be examined, requires that course. The balance of the tax was allowed as an expense of administration. On June 20, 1947, the trustee petitioned for leave to abandon the pledged property as an asset of the estate, and authority to do so was granted two months later. It may be taken as established that at no time did the bankrupt estate have any equity of value in the pledged goods; also that on or after the inception of the proceeding neither the debtor, the receiver, nor the trustee had actual possession thereof except as to a part, of the assessed value of about \$1,000, which was released to the trustee upon his paying its reasonable value. The court on review held the collector entitled to payment of his claim in full as an expense of administration, and the trustee appeals.

¹11 USCA §104(a).

So far as appears, the tax claimed by the collector was in all respects unexceptionable, that is to say the amount claimed constituted "taxes legally due and owing by the bankrupt." It is not contended that the valuation placed on the property was excessive, or that the tax was wrongly computed, or that in arriving at the valuation for tax purposes the amount of the encumbrance on the pledged portion of the property was, under state law, required or permitted to be deducted. Admittedly, also, the tax was unsecured, was due and payable on the first Monday in March,² and liability for its payment then attached as a personal obligation.³

We turn now to §64a of the Bankruptcy Act. This, so far as pertinent, provides: "(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) . . .; the costs and expenses of administration . . .; (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. And provided further, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; . . ."

The trustee's argument, as we understand it, is that the first proviso of this statute prohibits the payment of a tax to the extent that it is based on an *assessment* in

²§2901 Rev. & Tax Code of California.

³§§3003, 3004, Rev. & Tax Code of California.

excess of the value of the interest of the bankrupt estate in the property. We disagree. The proviso confers no authority on the court to reduce a tax claim unless the *tax* exceeds the value of the bankrupt's interest in the property. *Glass v. Phillips*, 5 Cir., 139 F. 2d 1016; *In re Ingersoll Co.*, 10 Cir., 148 F. 2d 282. Such was not the case here. The property assessed was one lot of goods, part of which had come into the possession of the estate and was sold for more than the amount of the total tax. We agree with the trial court that the subsequent abandonment of the pledged property did not operate to avoid the personal liability for taxes accrued while the debtor and the trustee were conducting the business pursuant to court order. We find nothing in the Act which relieves the trustee or debtor in possession from the payment of current taxes as they accrue. Cf. *Boteler v. Ingels*, 308 U. S. 57; *Swarts v. Hammer*, 194 U. S. 441; *United States v. Killoren*, 8 Cir., 119 F. 2d 364.

The Bankruptcy Court is given no authority to re-determine an assessment, or to divide it arbitrarily, after it has been quasi-judicially determined pursuant to state law. *Arkansas Corporation Commission v. Thompson*, 313 U. S. 132. Assuming the doubtful proposition that the trustee was entitled to any relief, his remedy was by application to the county board of equalization. *Quinn v. Aero Services, Inc.*, 9 Cir., decided January 24, 1949.

[Endorsed]: Opinion. Filed Feb. 21, 1949. Paul P. O'Brien, Clerk.

APPENDIX "B"

In the District Court of the United States, Southern District of California, Central Division.

In Bankruptcy. No. 44,737-WM.

In the Matter of A. Moody & Co., Inc., a corporation,
Bankrupt.

ORDER ON REVIEW OF REFEREE'S ORDER OF FEBRUARY 2,
1948 DISALLOWING IN PART THE CLAIM OF H. L.
BYRAM, TAX COLLECTOR OF THE COUNTY OF LOS
ANGELES, FOR PERSONAL PROPERTY TAXES.

Upon the petition for review filed March 2, 1948 by H. L. Byram, Tax Collector for the County of Los Angeles, State of California and upon the certificate of Referee David B. Head filed April 13, 1948; and upon the proceedings had before the referee as appears from his certificate; and upon hearing counsel for the parties; and it appearing to the court upon review, from the record of the hearing had before the referee on September 2, 1947 and the referee's findings of fact dated February 2, 1948

(a) that in the year 1947, and subsequent to the date of filing of the original petition herein [Bankruptcy Act, §§322, 378(1); 11 U. S. C. §§722, 778] the tax assessor for the County of Los Angeles assessed against the bankrupt estate an ad valorem tax in the amount of \$9,979.86 on all the personal property of the bankrupt estate [55] situated within Los Angeles County as of noon on March 3, 1947, including certain personalty stored by the bankrupt in the Haslett Warehouse, Los Angeles, prior to the petition;

(b) that the aforementioned assessment was in all respects accurate and made in accordance with the laws of the State of California as of the tax day (March 3, 1947) [Constitution of California, Art. XIII; Cal. Rev. & Tax Code, §§401-871];

(c) that the referee's order of abandonment dated August 20, 1947—which directed the trustee in bankruptcy "not to take over" the aforementioned property stored in the Haslett Warehouse—did not affect the liability of the bankrupt estate under §§62a(1) and 64a(1) of the Bankruptcy Act [11 U. S. C. §§102a(1) and 104a(1)] for taxes legally assessed and accruing after bankruptcy [cf.: *In re Humeston*, 83 F. (2d) 187 (C. C. A. 2d, 1936); *Robinson v. Dickey*, 36 F. (2d) 147 (C. C. A. 3rd, 1929), cert. den. 281 U. S. 750 (1930)];

(d) that the bankruptcy court, in approving a claim for taxes as an expense of administration, may review a tax assessment [see *Arkansas Corp. v. Commn. v. Thompson*, 313 U. S. 132 (1940) and *Gardner v. New Jersey*, 329 U. S. 565 (1947)]; but may not, under §§62a(1) and 64a(1) of the Bankruptcy Act [11 U. S. C. §§102a(1) and 104a(1)] reduce or disallow a claim for taxes legally assessed under the laws of the taxing sovereign, irrespective of whether or not the assessment has been approved by judicial decree or by act of a quasi-judicial officer or tribunal [cf.: *Lyford v. City of New York*, 137 F. (2d) 782 [56] (C. C. A. 2d, 1943)]; and

(e) that accordingly the petitioner herein is entitled to full payment of the \$9,979.86 claim against the bankrupt estate for personal property taxes as an

expense of administration [Bankruptcy Act, §§62a and 64a(1); 11 U. S. C. §§102a(1) and 104a(1); 3 Collier on Bankruptcy, pp. 1509-1519, 2077-2082];

It Is Ordered that the order of the referee, dated February 2, 1948, disallowing in part the claim of H. L. Byram, Tax Collector of the County of Los Angeles, be and said order is hereby vacated and set aside; and the matter is hereby recommitted to the referee with directions to enter an appropriate order allowing the claim in full as an expense of administration.

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to

- (1) Referee David B. Head;
- (2) The attorney for the petitioner; and
- (3) The attorneys for the trustee.

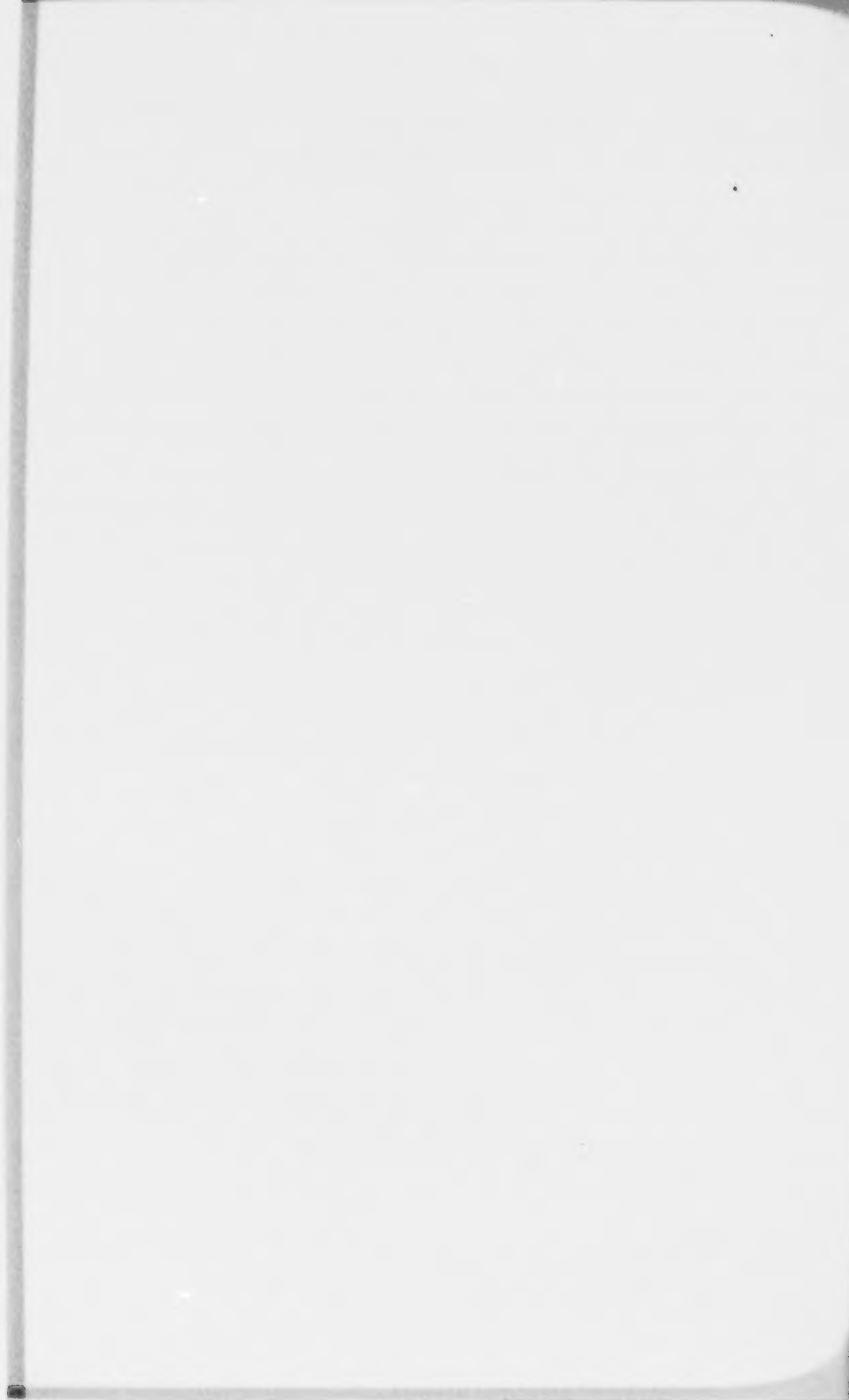
June 4, 1948.

WM. C. MATHES

United States District Judge

Judgment entered Jun. 4, 1948. Docketed Jun. 4, 1948. C. O. Book 51, page 121. Edmund L. Smith, Clerk; by Louis J. Somers, Deputy.

[Endorsed]: Filed Jun. 4, 1948. Edmund L. Smith, Clerk. [57]



IN THE
Supreme Court of the United States

October Term, 1949.

No.

GEORGE T. GOGGIN, as Trustee of the Estate of A. Moody
& Co., Inc., Bankrupt,

Appellant,

vs.

H. L. BYRAM, Tax Collector for the County of Los An-
geles, State of California,

Appellee.

Brief in Support of Petition for Writ of Certiorari to
the United States Court of Appeals for the Ninth
Circuit.

May It Please the Court:

Opinions Below.

The opinion of the Court of Appeals, so far as we are
advised, is not yet reported but is set forth *verbatim* in
Appendix "A," pages 15-18, attached to the within petition
and brief.

The opinion of the District Court including its order is set forth *verbatim* in Appendix "B," pages 19-21, attached to the within petition and brief.

Jurisdiction.

The grounds upon which the jurisdiction of this Court is invoked are stated in the petition at page 2.

Statement of the Case.

The facts appear in the petition at pages 5 to 10 and in the interest of brevity are not repeated herein.

Specifications of Error.

The Court of Appeals for the Ninth Circuit Erred:

1. In holding that the Bankruptcy Court has no power to reduce a tax claim, assessed after bankruptcy, to the extent that the tax is levied against pledged personal property of no value to the bankrupt estate and which never came into the bankrupt estate and which was never utilized by the bankrupt estate.
2. In holding that a tax, assessed after bankruptcy, against pledged personal property of no value to the bankrupt estate and which never came into the bankrupt estate and which was never utilized by the bankrupt estate, was an expense of administration even though such property, after the assessment had been made, was duly abandoned by order of the Bankruptcy Court.
3. In holding that a tax assessed after bankruptcy against pledged personal property of no value to the bank-

rupt estate and which never came into the bankrupt estate and which was never utilized by the bankrupt estate, was not subject to the *first proviso* of Section 64a(1) of the Bankruptcy Act, because the tax was included in a tax levy against other free personal property of a value greater than the total tax levied on both the pledged and free property.

4. In holding that an order of abandonment of pledged personal property is not effective as of the date of bankruptcy, where such pledged personal property was never utilized by the bankrupt estate and no benefit was ever derived therefrom by the bankrupt estate.

Summary of Argument.

1. A court of bankruptcy has power under the *first proviso* of Section 64a(1) to eliminate a tax levied upon personal property encompassed by the proviso.

2. The *first proviso* applies to a valueless portion of personal property even though the remainder is of a value greater than the tax levied on all the personal property.

3. An order of abandonment, even though made after the tax date, is effective as of the date of bankruptcy where the abandoned property is not utilized by the bankrupt estate nor taken into its possession. This rule is enunciated by the California courts.

Argument.

As a prelude may the appellant point out that he is not attacking any *valuation* made by the appellee of the property involved and that he is *not* attacking the *assessment* made in connection therewith. The appellant merely objects to the payment, as an expense of administration, of a tax on pledged property, no matter what the assessed valuation might be, when no part of the pledged property ever came into the possession of, or under control of, or brought any benefit to, the bankrupt estate, and was actually abandoned within a reasonable time after the appointment of appellant trustee and in which the bankrupt estate possessed no interest of value.

I.

A Court of Bankruptcy Has Power Under the First Proviso of Section 64a(1) to Eliminate a Tax Levied Upon Personal Property Encompassed by the Proviso.

Using *Arkansas Corporation Commission v. Thompson*, 313 U. S. 132, as a fulcrum, the Circuit Court reasoned that the Bankruptcy Court was powerless to enforce the *first proviso* of Section 64a(1), because it "is given no authority to redetermine an assessment, or to divide it arbitrarily, after it has been quasi-judicially determined pursuant to state law. *Arkansas Corporation Commission v. Thompson*, 313 U. S. 132."¹

¹Tr. p. 63, line 23.

The Circuit Court misconstrued the effect of *Arkansas Corporation Commission v. Thompson, supra*; for in *Gardner v. State of New Jersey*, 329 U. S. 565, the Supreme Court itself considerably delimited many apparent generalities in the former decision. The Supreme Court points out that there are numerous historic bankruptcy powers which are part of the arsenal of authority the exercise of which are not precluded by the rule of *Arkansas Corporation Commission v. Thompson, supra*.²

²The essence of *Arkansas Corporation Commission v. Thompson, supra*, and *Gardner v. State of New Jersey, supra*, are contained in the following quotations from the latter, which though extensive, we set out for convenience of the court:

"Third. We held in *Arkansas Corporation Commission v. Thompson, supra*, that the reorganization court lacked the power under Section 77 to redetermine for state tax purposes the property value of a railroad where that value had already been determined in state proceedings which afforded ample protection to the railroad's rights. We adhere to that decision. Its ruling precludes redetermination by the reorganization court in this case of the valuations underlying the assessments made by the state authorities and the validity of those assessments used as the basis for the computation of the taxes. It may not therefore entertain the objections to New Jersey's claim which tender those issues. The proper tribunals where those issues may be litigated, if they are still open for any year, are the state agencies and court and, under special circumstances, the federal courts."

"Fourth. The rule of *Arkansas Corporation Commission v. Thompson, supra*, does not, however, preclude the reorganization court from adjudicating the other issues raised by the objections to New Jersey's claim. The contrary view, which the Circuit Court of Appeals apparently took, fails to recognize historic bankruptcy powers which, as we have already pointed out, are part of the arsenal of authority granted the reorganization court by Section 77.

(1) The validity and priority of one lien, whether or not claimed by a State, as against other liens, are questions for the reorganization court. Illustrating but not limiting the range of that inquiry are questions whether local law creates the lien asserted; whether it was sufficiently perfected prior to the petition for reorganization as to be good against other liens, cf. *New York v. Maclay, supra*; *United States v. Texas, supra*; whether, if it were inchoate at that time, it could be

The referee in bankruptcy did not vary the valuation fixed by appellee in the sum of \$126,950.00, nor change the assessment made in the same amount; nor reduce or change the amount of the tax, \$9,979.84, attributable to such property.

But he did find that included in the property taxed by the appellee was certain pledged property of a value of \$88,118 which never came into the possession of the estate and was never used by the estate and possessed no

perfected subsequent to the petition, *Lyford v. State of New York*, 140 F. 2d 840; and whether the lien, though paramount, is subordinate to administration expenses or other claims under either the general bankruptcy rule, *City of New York v. Hall*, 139 F. 2d 935, or the equity rule, 5 Collier on Bankruptcy (14th ed.) 77.21. See *Warren v. Palmer*, 310 U. S. 132.

(2) The extent of the lien—to what property it applies, and whether it is restricted to realty or covers personal property or revenues as well—are also questions for the reorganization court. See *Ecker v. Western Pacific R. Corp.*, *supra*, pp. 489, 503.

(3) The reorganization court may also adjudicate questions pertaining to the amount of a tax claim secured by a lien without crossing the forbidden line marked by *Arkansas Corporation Commission v. Thompson*, *supra*. There is, for example, the question whether the amount of the claim has been swollen by the inclusion of a forbidden penalty and thus to that extent does not meet the bankruptcy requirements for proof and allowance of claims. Section 57j of the Bankruptcy Act provides that debts owing a State as a 'penalty or forfeiture' shall not be allowed. What claims accruing before bankruptcy and sought to be proved by a State are 'penalties,' *New York v. Jersawit*, 263 U. S. 493, and what are not. *Meilink v. Unemployment Reserves Commission*, 314 U. S. 564; the applicability of Section 57j to reorganizations under Section 77; the liability of the estate for penalties incurred by the trustee in the operation of the business; *Boteler v. Ingels*, 308 U. S. 57; what interest, if any, accrues after the petition for reorganization has been filed, *Vanston v. Green*, 329 U. S., are all questions for the reorganization court."

* * * * *

"When a State files a proof of claim in the reorganization court, it is using a traditional method of collecting a debt.

interest of value for the estate and was abandoned by the estate pursuant to Court order and that the tax thereon at the valuation and assessment fixed by the appellee was the sum of \$5,389.90.³ And that payment of any part of the latter amount was forbidden by the first proviso.

It has not been contended by either appellant or the appellee "that in arriving at the valuation (of the property) for tax purposes the amount of the encumbrance

A proof of claim is, of course, *prima facie* evidence of its validity. *Whitney v. Dresser*, 200 U. S. 532. But the bankruptcy court whose aid is sought for enforcement of an asserted claim is not bound to treat the tendered proof as conclusive. When objections are made, it is duty bound to pass on them. That process is, indeed, of basic importance in the administration of a bankruptcy estate whether the objective be liquidation or reorganization. Without that sifting process, unmeritorious or excessive claims might dilute the participation of legitimate claimants.

It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. *Wiswall v. Campbell*, 93 U. S. 347, 351. If the claimant is a State the procedure of proof and allowance is not transmuted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*. It is none the less such because the claim is rejected *in toto*, reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash. When the State becomes the actor and files a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim. See *Clark v. Barnard*, 108 U. S. 436, 447-448; *Gunter v. Atlantic Coast Line*, 200 U. S. 273, 284, 289; *Missouri v. Fiske*, 290 U. S. 18, 24-25."

³The referee allowed the tax on \$992.82 of pledged goods purchased by the trustee. The appellant did not review this portion of the order.

on the pledged portion of the property was, under state law, required or permitted to be deducted.”⁴

Or in other words, under state law the trustee could not have eliminated the gross value of the pledged property from his declaration to the assessor, nor could the appellee have recognized any such elimination if made. Accordingly, the only body to pass on the effect of the *first proviso* was the bankruptcy court, after the claim for an expense of administration was filed with it by the appellee. The situation would appear to be one of the “special circumstances” included in “historic bankruptcy powers” referred to in *Gardner v. New Jersey, supra*. Just as the Bankruptcy Court under Section 57j has power to eliminate a penalty incorporated in a tax claim otherwise properly levied, so it has the power and duty to forbid payment of a tax levied upon personal property encompassed by the *first proviso*.

⁴See opinion of Circuit Court, p. 62 of Record below.

II.

The First Proviso Applies to a Valueless Portion of Personal Property Not Taken Over By the Bankrupt Estate Even Though the Remainder Exceeds in Value a Tax Levied on All Such Personal Property.

The Circuit Court, we believe, at least partially misconstrued appellant's contention regarding the effect of the *first proviso*.⁵ The appellant has never argued that the *first proviso* prohibits the payment of a tax to the extent that it is based on an *assessment* in excess of the value of the interest of the bankrupt estate in the property.⁶ The Circuit Court correctly decided, as a general matter, that the Bankruptcy Court may not reduce a tax claim *unless the tax* exceeds the value of the bankrupt estate's interest in the property.

The rulings in *Glass v. Phillips*,⁷ 5th Cir., 139 F. 2d 1016, and *In re Ingersoll*, 10th Cir., 148 F. 2d 282, to the contrary notwithstanding, the appellant contends that the *first proviso* means that where two or more items of personal property are involved, one of which is encumbered beyond its gross value (so that there is no value for the bankrupt estate), and the other has a value for the bankrupt estate greater than the *tax* levied on both items, the portion of the tax attributable to the first item should be eliminated. And especially so under the facts of this case: (1) where no use was made of the encumbered item; (2) possession was never taken by the

⁵See opinion of Circuit Court, par. 3, p. 62 of Records below.

⁶Statement of Points on Appeal II, III and IV, pp. 54, 55 and 58 of Record below.

⁷Decision in *Glass v. Phillips* seems to be based on Section 64a as it existed prior to the Amendment of 1938.

bankrupt estate; (3) where the tax thereon is asserted as an expense of administration; and (4) where the encumbered property was abandoned.

To hold otherwise will completely emasculate the purposes of the *first proviso*.

Prior to 1926 the Bankruptcy Act contained no provision similar to the *first proviso*. Numerous inequities appeared which required the tax payments to be made by bankrupt estates on *real* property without value to the bankrupt estate (3 Collier (14th ed.) p. 2047) and a proviso was added "that no order shall be made for the payment of a tax assessed against real estate of the bankrupt in excess of the interest of the bankrupt estate therein as determined by the court." Section 64a, by Act of May 27, 1926, 44 Stat. 662, 9 Collier (14th ed.) 1819, Appendix. In 1938 the section was further amended by striking out the word "real estate" and inserting "any property" so that the section since 1938 has read "Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the bankrupt estate therein as determined by the court . . ." 3 Collier (14th ed.), p. 2049.

Progressively, it will be noted, the right of taxing authorities was limited. From 1898 to 1926 any and all property taxes were payable no matter what the value of interest of the bankrupt estate might be.⁸ From 1926 to 1938 taxes on real property were payable only to an amount not "in excess of the value of the interest of the bankrupt estate therein as determined by the court,"

⁸*Dayton v. Stanard*, 241 U. S. 588, 37 A. B. R. 259, 60 L. Ed. 1190, 36 S. Ct. 695.

and in 1938 the same rule became effective in respect to "any property of the bankrupt estate." The most complete discussion found by appellant is contained in 3 Collier (14th ed.), Section 64.406, commencing at page 2136 and continuing through page 2143. The following are extracts from that section:

"After the 1926 amendment, a trustee could by the process of abandonment of heavily incumbered real estate reduce the taxable interest of the bankrupt's estate to zero." (Note 4, page 2137.)

"Under the proviso as extended by the 1938 Act to include both real and personal property, a needed element has been supplied. Any personal property incumbered, as by a chattel mortgage, or depreciated in value, may be abandoned by the trustee; or in the alternative evaluated as to the extent of the bankrupt estate's interest, as by a sale, and taxes paid on the basis of such evaluation." (Note 8, pages 2137-38.)

"Any tax payment from funds in the trustee's control will be limited to the value, if any of the estate's interest in the property over and above the amount of the lien." (Note 11, page 2138.)

See, also, opinion of Referee Bristow, District Court of Kansas, April 21, 1941, 50 A. B. R. (N. S.) 815, which follows contentions of appellant.

The effect of the holding of the Circuit Court is that if there be other property in an estate, personal, real, money, choses in action, any kind, of value to the estate, then all taxes on encumbered property, no matter how useless or valueless it may be to the estate, must be paid by the estate on the gross value of the encumbered property.

The holding of the Circuit Court not only renders nugatory the intention of the 1938 amendment—to add personal property to the scope of the *first proviso*—but actually eliminates the effect of the 1926 amendment respecting real property. Assume that there were encumbered real property of no value to an estate, with levied taxes of \$1,000.00, and personal property, perchance money, from which the estate realized \$2,000.00, with levied taxes of \$100.00. Prior to the 1926 amendment the bankrupt estate would have been liable for \$1100.00 taxes, \$1,000.00 on the real estate and \$100.00 on the personal property. After the 1926 amendment the estate would have been liable for only \$100.00 taxes assessed on the personal property. Under the rule laid down by the Ninth Circuit, after the 1938 amendment, the bankrupt estate again becomes liable for the payment of \$1100.00 because the estate has *some* property of a value in excess of *all* taxes assessed against *all* property of the bankrupt estate.

In spite of the fact that three Circuit Courts, the Ninth, the Fifth and the Tenth have held contrary to appellant's position, the appellant earnestly insists that the *first proviso* means that no tax shall be paid on a particular item of real or personal property for an amount greater than the interest of the bankrupt estate in the particular item of property; all without regard to the value of the interest of the bankrupt estate in other property, real or personal.

III.

An Order of Abandonment, Even Though Made After the Tax Date, Is Effective as of the Date of Bankruptcy Where the Abandoned Property Is Not Utilized by the Bankrupt Estate nor Taken Into Its Possession. This Rule Is Enunciated by the California Courts.

The Circuit Court agreed with the District Court "that the subsequent abandonment of the pledged property did not operate to avoid the personal liability for taxes assessed while the debtor and the trustee were conducting the business pursuant to court order." The Circuit Court found "nothing in the act which relieves the trustee or debtor in possession from the payment of current taxes as they accrue. *Cf. Botcler v. Ingels*, 308 U. S. 57; *Stwarts v. Hammer*, 194 U. S. 441; *United States v. Killoren*, 8 Cir., 119 F. 2d 364."

The District Court had cited as authority *In re Humeston*, 83 F. 2d 189 (C. C. A. 2d, 1936), and *Robinson v. Dickey*, 36 F. 2d 147 (C. C. A. 3d, 1929), cert. denied 281 U. S. 750 (1930).

A reading of the *Humeston* case, *supra*, will disclose that payment of the taxes was ordered *because the trustee had occupied and used the property involved, and as an expense for use and occupation only for the period that he used the property*, and further that the Court neither ordered nor permitted the abandonment of the property involved.

A reading of the *Robinson v. Dickey*, *supra*, case discloses a similar situation arising from controversy between

bond holders and the trustee in bankruptcy over payment of costs of operation where the trustee was actually and physically in possession of the property and making use thereof for the benefit of the general creditors.

Boteler v. Ingels, supra, involved a tax penalty on automobiles which, on the tax date, were actually being used by the trustee in the operation of the business.

Swarts v. Hammer, supra, involved a tax on property (money) in the possession of the trustee on the tax date; and was decided long prior to the enactment of the first proviso.

United States v. Killoren, supra, merely holds that all claims of administration, including tax claims held to be an administration expense, were of the same priority.

The correct rule is that taxes accruing as a consequence of the operation of a business by (a bankrupt estate) are expenses of administration,⁹ provided that the property taxed has been utilized by the estate in bankruptcy. *Northumberland County et al. v. Philadelphia & Reading Coal & Iron Co.*, Third Circuit, 131 F. 2d 562; *Hennepin County v. Savage*, Eighth Circuit, 83 F. 2d 453.

In *Northumberland County et al. v. Philadelphia & Reading Coal & Iron Co., supra*, a petition under Section 77B was filed February 26, 1937. Taxes accrued for two years after the filing, the sum of which were not paid by

⁹*McColgan v. Maier Brewing Company*, Ninth Circuit 1943, 134 F. 2d 385.

the debtor in possession. The taxing authorities contended that all the taxes were expenses of administration. The Court said:

"It may not be doubted that taxes upon land, just as wages and rent, may become an obligation of a receiver, trustee in bankruptcy or a debtor in possession as a proper charge in the administration of the estate. This is so *when the receiver, trustee or debtor actually utilizes in the operation of the business the land upon which the taxes are assessed*. Taxes then become an administration expense and as such are payable without respect to whether the land has been described by the assessor as seated or unseated. *Hennepin County v. Savage* (8th Circ., 1936), 31 A. B. R. (N. S.) 89, 83 Fed. (2d) 452. If, therefore, the debtor here used the land during the two years when it held title the taxes thereon would be payable as an administration expense. The record before us contains no evidence that such was the case." (Italics ours.)

See also *Matter of Mt. Washington Steamship Co.*, 43 Fed. Supp. 176, where an involuntary petition was filed March 26, 1941, the tax date being April 1, 1941. The tax claim was disallowed by the referee as an expense of administration, no equity having been obtained by the trustee above pre-bankruptcy construction liens against a boat. The assessor endeavored to show that the tax was against the trustee and was an expense of administration. The Court held that "trustee had never operated the boat and it does not appear that he was ever authorized to operate it. He merely sold the boat at auction as it was when he took it over," and denied the claim as an expense of administration.

In the State of California the accepted rules regarding abandonment were enunciated in *Helvey v. United States Building & Loan Association*, 81 Cal. App. 2d 647, as follows:

“When assets have been abandoned by a trustee or a receiver, the property, insofar as the abandoner is concerned, is left as though he had never owned or claimed it and the ‘title stands as if no assignment had been made.’

The situation is analogous to an unaccepted or a rejected gift—the title is left as though the gift had not been made (*Brown v. Keefe*, 300 U. S. 598, 81 L. Ed. 827; *In re Webb*, 54 Fed. 2d 1065; *In re Moss*, 21 Fed. Supp. 1019) . . . (742) Either a receiver or a trustee has the right to determine whether the assets are so burdensome or of such little value as to render the administration of the same unprofitable, and if he so determines, the court may upon his petition authorize the abandonment of the worthless property.”

Under the decision of this Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, it would appear that the rule of *Helvey v. United States Building & Loan Association*, *supra*, should have been followed insofar as the appellee's rights were concerned.

Conclusion.

The opinion of the Court of Appeals for the Ninth Circuit is not only contrary to the law but will, unless reversed, hamper the ordinary and proper administration of bankruptcy proceedings. It renders impossible effective compliance with the intention of Congress in its enactment of the *first proviso* of Section 64; it leaves to chance the existence of a reasonable time within which

property may be abandoned by the Bankruptcy Court, saddles general creditors with unwarranted prior tax claims on totally worthless property and creates expenses of administration not authorized by the Bankruptcy Act.

Wherefore, it is respectfully submitted that this petition for Writ of Certiorari should be granted, and that this Honorable Court review the decision of the United States Court of Appeals for the Ninth Circuit and reverse it.

Dated: June 13, 1949.

Respectfully submitted,

THOMAS S. TOBIN,

Counsel for Petitioner.

FRANK C. WELLER and

RUSSELL B. SEYMOUR,

Of Counsel.

I, Thomas S. Tobin, a member of the Bar of this Court and one of the attorneys for the appellant, hereby certify that the foregoing petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit is made in good faith and without any intent to hinder or delay appellee.

THOMAS S. TOBIN.